Foreign Acquisitions and Takeovers Amendment Regulations (No. 1) 1999 No. 199

EXPLANATORY STATEMENT

Statutory Rules 1999 No. 199

Subject *Foreign Acquisitions and Takeovers Act 1975*

Foreign Acquisitions and Takeovers Amendment Regulations (No. 1)

Section 39 of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides for the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 12A(8) provides for regulations to be made to remove specified categories of urban land acquisition from notification or examination under the Act.

Subsection 13(1)(d) and 13(1)(e) of the Act provide for prescription of the monetary amounts used in those subsections to define the value of a foreign corporation, above which it is a prescribed corporation.

Subsection 13A(4) provides for prescription of monetary amounts used in that section to define an exempt corporation or an exempt business.

The purpose of the regulations is to reduce notification obligations on business and streamline the administration of foreign investment policy, while continuing to ensure that foreign investment is consistent with Australia's interests.

In June 1996, the Government included a review of the Act among the schedule of reviews of legislation that impose costs upon business. In its Individual Action Plans from 1996 to 1998 Australia committed to other Asia Pacific Economic Cooperation (APEC) countries that it would rationalise restrictions on foreign investment in real estate, and review the screening system in relation to foreign investment in 'non-sensitive' sectors. In February 1999, the Prime Ministers of Australia and New Zealand established a Joint Prime Ministerial Task Force on Australia and New Zealand Bilateral Economic Relations. Following work of this Task Force, on 4 August 1999 the Prime Minister announced a number of changes to Australia's foreign investment regime that would facilitate investment between Australia and New Zealand. On 3 September 1999, following work pertaining to the review of foreign investment, the Treasurer announced a further set of measures.

The regulations specify increases in the notification threshold for foreign investment in existing businesses from $5 million ($3 million for rural businesses) to $50 million. They also specify an increase in the notification threshold from $20 million to $50 million for the Australian assets of an offshore company where it is to be acquired by another offshore company. Where properties are not subject to heritage listing, the regulations specify an increase in the notification threshold applying to the acquisition of developed non-residential commercial real estate from $5 million to $50 million.

Other amendments to regulations specify:

* an exemption to remove foreign investment approval requirements for individuals who hold,

or are entitled to hold, a special category visa, or who hold a permanent visa and invest in

Australian residential real estate through Australian companies and trusts;

* an exemption so that Australian citizens and their foreign spouses purchasing as joint tenants

are no longer required to seek approval for purchases of residential real estate in Australia;

* an exemption for the acquisition of interests in Australian urban land by foreign owned

responsible entities of managed investment schemes registered under Chapter 5C of the

Corporations Law, provided such investment is primarily for the benefit of scheme members

ordinarily resident in Australia;

* rules to permit the acquisition by foreign interests of strata-titled hotel rooms in designated

hotels where each room is subject to a long-term (10 years or more) hotel management agreement;

* rules to limit the exemption provided by newly designated Integrated Tourist Resorts so

that the exemption from the normal foreign investment restrictions only applies to

foreign purchasers of developed property which is subject to a long term lease to the

resort/hotel operator making it available for tourist accommodation when not occupied

by the owner; and

* rules to clarify the scope of a certificate of exemption issued by the Treasurer for

foreign interests acquiring real estate off-the-plan, as provided in the existing regulation 3(e).

Details of the regulations are included in an attachment to this statement.

The regulations commence on gazettal.

Attachment

Foreign Acquisitions and Takeovers Amendment Regulations. 1999 (No. 1)

Subsection 13A(4) of the Act exempts, corporations and businesses from acquisition and control provisions of the Act, where those corporations and businesses have total assets that do not exceed $5 million or other such amount as prescribed. Subsection 13A(4) also provides exemption from acquisition and control provisions of the Act for a corporation or business whose total assets do not exceed $3 million or other such amount as prescribed, where more than 50 per cent of the value of those assets is attributable to Australian rural land.

Regulation 5 will increase both of these mandatory thresholds to $50 million. The change will not affect the notification thresholds applying to 'urban land corporations'. An 'urban land corporation' is a company or trust having an interest, option or lease over Australian urban land where the value attributable to that land is more than one half of the value of the total assets of the company or trust.

Regulation 4 is designed to raise the threshold for examination under the Act of Australian corporations and Australian assets that are subject to offshore takeovers. For example, where an offshore company acquires another offshore company it will generally be exempt from examination under the Act provided the total value of Australian assets owned by the target company is less than $50 million. This amendment is consistent with the values set in regulation 5.

Regulation 3(e) of the Act provides an exemption from the Act for foreign acquisitions of an interest in property being sold by a specified real estate developer where the Treasurer has issued a certificate to that developer specifying that the sale is not contrary to the national interest. Such certificates are normally issued prior to foreign acquisitions of dwellings in off-the-plan developments and are on condition that not more than a specified percentage of the dwellings may be sold to foreign interests and that the developer provides a report on all sales. The previous regulation was technically deficient in that it did not adequately cater for these conditions. The amendment to regulation 3(e) makes explicit that a certificate can include conditions.

The amended regulation 3(p) of the Act provides an exemption from the scope of the Act for foreign acquisitions of an interest in developed non-residential commercial property valued at less than $50 million. Previously this value was $5 million. The amended regulation exempts from the scope of the Act the acquisition of non-residential commercial land valued at less than $50 million that is not vacant land, nor land the whole or part of which comprises an accommodation facility, or is valued at more than $5 million and is not listed on the Register of the National Estate.

Regulation 3(q) exempts foreign nationals who hold a permanent visa or are entitled to hold, a 'special category visa' (for example a New Zealand citizen) from the requirements of the Act when acquiring residential real estate in Australia. The amendment extends the exemption to cover acquisitions by Australian corporations and trusts that are beneficially owned by this same exempt group of visa holders.

Regulation 3(s) is designed to allow acquisition by foreign interests of equity in an hotel by way of a strata title, while at the same time protecting the integrity of the foreign investment policy on residential real estate. Further, the regulation is intended to reduce the costs of Australian hotel operators acquiring capital from foreign interests who wish to have the security of a strata title.

Previously acquisitions of strata titles of rooms or suites in hotels were considered under the residential real estate policy. If the hotel was new, sale of the individual rooms fell under regulation 3(e), the "off-the-plan" category, so that up to 50 per cent of them may be sold to foreign persons.

If the hotel was not new, none of the strata titled rooms could be sold to foreign interests. This was consistent with residential real estate policy and protected the integrity of that policy. In contrast foreign investment approvals were granted for proposals to acquire, under one title, hotels new or established.

The new regulation permits the acquisition of strata titles by foreign interests on condition that the room continues to be used as part of the hotel's accommodation and not as a residence that is used or controlled at the direction of the owner. The test will be that the acquisition is tied to a long-term management agreement (ten years or more). The hotel management agreement would give the owner rights to an income stream, not occupancy. The management would retain ownership of the common property. In addition, owners of the strata title would not have the right to opt out of the management agreement.

Regulation 3(r) provides for foreign investors to be able to acquire residential real estate within a designated Integrated Tourism Resort (ITR) without the need to seek approval under the Act. An ITR is a tourist development satisfying the following criteria:

* it is a destination tourist development on a contiguous site normally covering a minimum of

  50 hectares within well defined boundaries and planned and constructed by a single

  developer;

* has an existing core hotel(s) of sufficient size and standard to provide the central focus for the

  resort and to provide about 20 per cent or more of the ITR's total accommodation;

* has 'non-hotel' accommodation facilities within the boundaries of the resort; and,

* has extensive recreational facilities (such as golf courses, tennis courts, swimming pools,

  walking tracks etc) within the boundaries of the resort.

The amended regulation 3(r) is designed to tighten eligibility requirements for ITRs, to enhance their nature and to remove the policy anomaly between the foreign acquisition of developed residential real estate within and without ITRs. That is, the policy of designating ITRs within which foreign persons are permitted to acquire residential real estate without restriction, will only apply to developed residential property which is leased back to the resort operator to be available for tourist accommodation when not occupied by the owner. Owners of residential property in existing ITRs retain their current entitlements.

Regulation 3(t) exempts acquisitions of real estate by Australian citizens and their foreign spouses acquiring residential real estate as joint tenants.

Under section 26A of the Act a foreign person is required to notify the Government of a proposed acquisition of residential real estate with their Australian citizen spouse. Normally these

proposals have been approved on condition that the husband and wife acquire the subject property as joint tenants (rather than as tenants-in-common). A foreign de facto spouse of an Australian citizen is required to demonstrate, for example, by signing a statutory declaration, that he or she is in a bona fide relationship as the husband or wife of the Australian citizen, normally for a period of at least 12 months prior to the application. The amendment should reduce the compliance burden on Australian citizens married to or in a de facto relationship with a foreign spouse.

The amendment to regulation 2 provides the definition of spouse for the purposes of regulation 3(t) and draws on the definition used in the *Income Tax Assessment Act 1936.*

Under Section 26A of the Act foreign trustees (or custodians) conducting public trustee businesses are required to obtain foreign investment approval prior to the acquisition of real estate. This restriction applies even when the investment is being made on behalf of Australian beneficiaries.

Regulation 3(u) provides an exemption for the acquisition of interests in Australian urban land by foreign owned responsible entities of managed investment schemes registered under Chapter 5C of the Corporations Law, provided such investment is primarily for the benefit of scheme members ordinarily resident in Australia: that is, provided less than an substantial interest in the interests of the scheme are sold to foreign interests. This is consistent with the rules applying to life insurers and superannuation funds and will place both Australian and foreign-owned responsible entities on an equal footing for foreign investment purposes where they are acquiring urban land mainly for the benefit of beneficiaries ordinarily resident in Australia.

REGULATION IMPACT STATEMENT

CHANGES TO THE FOREIGN ACQUISITIONS AND TAKEOVERS REGULATIONS

BACKGROUND

The Government's approach to foreign investment policy is to encourage foreign investment consistent with the interests of the community. Overall the general stance of policy is welcoming, in recognition of the contribution that foreign investment has made and continues to make to the development of Australia, providing scope for higher rates of economic activity and employment than could be achieved on the basis of domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

2. The Government recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy is to ensure that foreign investment is not contrary to the national interest. In the majority of industry sectors, smaller proposals are exempt and larger proposals are approved unless they are found to be contrary to the national interest.

3. Australia's foreign investment policy provides for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The Government has the power under the *Foreign Acquisitions and Takeovers Act* 1975 (the Act) to block proposals that are determined to be against the national interest. The Act also provides legislative backing for ensuring compliance with the policy.

4. The screening process undertaken by the Foreign Investment Review Board enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

5. The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia, whenever they seek to establish or acquire new business interests, or purchase additional properties. In this way the Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

6. By far the largest number of foreign investment proposals involves the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate increases the supply of residences and are not speculative in nature. The Government's foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (ie, new developments - house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

7. The effect of the more restrictive policy measures on developed residential real estate is twofold. First, it helps reduce the possibility of excess demand building up in the existing housing market and secondly, it aims to encourage the supply of new dwellings, many of which would become available to Australian residents, either for purchase or rent. The cumulative effect should therefore be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

8. Australia's pre-establishment foreign investment screening process is widely regarded as an efficient and relatively low cost mechanism for helping to ensure foreign investment proposals are in the national interest. Over the past two decades, successive governments have moved to liberalise foreign investment policy. Since the introduction of the Act the bi-partisan policy trend has been to liberalise what was in 1975 a relatively restrictive foreign investment regime, while maintaining the pre-establishment screening process.

9. The policy liberalisation has been in response to the growing evidence of the benefits of foreign investment, the increasing depth and breadth of the economy and the implementation of other supportive policy and legislative measures; for example, the introduction of the Resources Rent Tax and improved corporate regulation. Micro-economic reforms instituted over the last two decades, including the ongoing trend to liberalisation of Australia's trade and investment regimes, are widely recognised as important contributing factors to Australia's current strong rate of growth, compared to the rest of the world, and its capacity to withstand the impact of the Asian crisis.

10. In June 1996, the Government announced that it would undertake a review of the Act in line with its commitment to review all legislation that can impose costs upon business. The review has been undertaken by Treasury and reported on each year in the Annual Report of the Foreign Investment Review Board (FIRB). While submissions were not formally sought, interested parties have made submissions to the Treasury on foreign investment policy and its administration.

11. The review took into account Australia's APEC Individual Action Plans (IAP) from 1996 to 1998, which included undertakings to review Australia's foreign investment policy. Australia's IAPs have been widely publicised, including on the Internet.

12. Australia's Individual Action Plan 1998 stated that "Australia will:

- complete its review of foreign investment policy, taking into account the work being undertaken in the OECD on a multilateral framework of rules for investment;

- retain only specified restrictions in relation to foreign investment in 'sensitive' sectors (including media, telecommunications and civil aviation);

- rationalise restrictions on foreign investment in real estate, involving some overall liberalisation;

- review the screening system in relation to foreign investment in the 'non-sensitive' sectors. This would possibly include:

: increasing the notification to, say, $50 million; and/or

: limiting the criteria for rejection using the 'contrary to the national interest' test in relation to national security, public order, environment protection and heritage issues.'

13. In September 1997, the Wallis Committee recommended (Recommendation No. 86) that foreign investment regulations for the funds management industry should be reviewed. The Government's response was to include that proposal for consideration in the broader review of foreign investment policy. In undertaking the review, the Government also considered recommendation 5.9 of the Mortimer Report of August 1997, that the operations of the Foreign Investment Review Board should be restricted to the examination of foreign investment in real estate.

14. During a visit to New Zealand in February 1999, the Prime Minister and the Prime Minister of New Zealand agreed to establish a Joint Prime Ministerial Task Force to help resolve longstanding bilateral concerns and included Trans-Tasman investment in the list of issues for negotiation.

ISSUE IDENTIFICATION

15. The issues for the review were in part identified in Australia's APEC IAP referred to above. Against the background that the Act and the foreign investment policy were to be retained, in summary the issues were:

* the perceived unnecessary impediments to inward investment from the foreign investment screening mechanism; and

* compliance costs for business and Australian citizens.

OBJECTIVES

16. The Government's objectives for the review were to rationalise regulation within the existing Act, to reduce compliance costs for business and to streamline administrative procedures.

* The Government has made it clear that the general preclusion of foreign interests buying developed residential real estate will continue and any approval for foreign interests to acquire vacant land for development will be on the condition that continuous development commences within 12 months of approval.

* There are clearly concerns in the community suggesting the general public would not support radical reform of the foreign investment policy as recommended in the Mortimer Report. In keeping with the general policy trend of successive governments, the proposed regulation changes are aimed at a liberalisation of policy while maintaining the pre-establishment screening process that has had longstanding community support.

COSTS AND BENEFITS OF THE PROPOSED CHANGES

17. The immediate benefit of the changes to the regulations will be to reduce costs to prospective foreign investors and their Australian associates. There may also be less direct and harder to measure benefits, from increased investment that may flow as a consequence of the more liberal rules. The changes will result in reduced legal costs for foreign investors and reduced delays (up to 30 days) in implementing such proposals. As well, the changes to the regulations may at the margin reduce the cost of capital raising. Most of the changes will reduce costs associated with administering existing policy, however there will be some increase in cost from issuing certificates, for example for the foreign acquisition of strata titles in hotels which has not previously been permitted. Any freed administrative resources may be used to increase public awareness of policy, improve the speed and effectiveness of the administration of policy, and/or to increase the compliance work undertaken by the FIRB.

18. The negotiations with New Zealand resulted in an agreement to undertake a full review of social security arrangements between the two countries to be completed and implementation of revised arrangements to be started before February 2001. In the interim, New Zealand is to provide a higher level of reimbursement of Australia's social security costs with respect to New Zealanders living in Australia. On the investment side, New Zealand will increase its threshold at which consent for non-land foreign investment is required from $NZ10 million to $NZ50 million.

19. Over the past 23 years Australia's foreign investment policy has been relaxed in response to the increasing depth and breadth of the economy and the implementation of other supportive policy measures (eg competition policy) that apply equally to Australian and foreign owned enterprises. As a result the Government is comfortable that these changes can be implemented with little risk that sensitive foreign investment proposals will proceed inappropriately. Moreover, the increased exemption for commercial real estate has not been extended to properties on the Register of the National Estate. Accordingly, there is expected to be very little cost relative to the significant benefits derived from the changes.

CHANGES TO REGULATIONS

20. A discussion of the specific reform measures is set out below.

Increase in the foreign investment exemption threshold under the Act from $5 million to $50 million for acquisitions of corporations/businesses.

Background

* As announced on 4 August 1999 in the Joint Prime Ministerial Communique between Australia and New Zealand, Australia will increase the threshold for acquisitions of existing corporations/businesses under the Act from $5 million ($3 million for rural businesses) to $50 million. Also, Australia will raise the administrative threshold under which business applications are notified but generally not examined in detail from $50 million to $100 million.

* Section 13A(4) of the Act provides an exemption, for the purposes of the Act, to corporations and businesses whose total assets do not exceed $5 million ($3 million for rural businesses) or other such amount as prescribed.

- The regulations tabled prescribe both of these thresholds to be $50 million.

* A consequential change, to those announced on 4 August 1999, is to increase from $20 million to $50 million the threshold applying to 'offshore takeovers'. That is, where an offshore company acquires another offshore company it should seek prior approval if the total value of Australian assets owned by the target company is $50 million or more.

- This change prescribed in a regulation, supports Australia's undertakings made in an APEC context, both in relation to Australia's 1996 and 1998 APEC Individual Action Plans.

Issue

* Foreign interests have been required to submit applications to the FIRB for the proposed purchase of Australian businesses or assets valued at $5 million or more ($3million or more for rural properties). Provided the total assets and/or consideration for the acquisition was below $50 million, the application was examined in detail, only if it raised issues clearly concerning the national interest. In recent years approximately 300 applications per year have been made to acquire firms with assets valued from $5 million to $50 million. The process imposed a minor compliance burden on foreign interests who are required to submit applications that are rarely rejected (less than five a year). At the margin, the screening process may elevate the costs of access to capital for Australian business. There was also a small administrative cost in processing applications.

Objectives

* To implement the changes announced on 4 August 1999 in the Joint Prime Ministerial Communique between Australia and New Zealand and to reduce compliance and administrative costs of Australia's foreign investment regime.

Benefits

* The intended effect is to address what New Zealand companies have seen as an irritating nuisance in acquiring Australian non-sensitive business assets. However, consistent with Australia's non discriminatory approach to foreign investment policy the benefits will be extended to all foreign interests acquiring existing Australian business assets valued up to the $50 million threshold as prescribed under the Act.

* The changes will reduce business compliance and regulatory administrative costs associated with complying with the Act. On the basis of recent applications this is estimated to be an annual aggregate cost reduction in the order of $1 million (of which about 90 per cent would arise from a reduction in business costs).

Costs

* Cost aspects of the increases in the exemption threshold for the acquisitions of Australian businesses/assets are discussed in paragraph 19 above.

Extension of exemptions applying to the acquisition of urban real estate for those included in the 'special visa' category and permanent residents

Background

* Under regulation 3(q)(i) of the *Foreign Acquisitions and Takeovers Regulations* foreign nationals who hold, or are entitled to hold, a 'special category visa' (for example, a New Zealand citizen) are exempt from the requirements of the Act in relation to investment in residential real estate. As one of the negotiated outcomes with New Zealand, this regulation is extended to exempt acquisitions by such visas holders purchasing real estate through an Australian company or trust.

* The Government subsequently decided to provide a similar extension to the exemption available to permanent resident visa holders.

* The changes will have only a marginal effect on real estate markets and do not represent a departure from the policy of generally limiting access by foreigners to residential real estate.

Issue

* Persons eligible for a special category visa or holders of permanent resident visas, can purchase, without notification, real estate as an individual, but had to seek approval to purchase through an Australian company or trust.

Objective

* To implement the changes announced on 4 August 1999 in the Joint Prime Ministerial Communique between Australia and New Zealand.

Benefits

* Removes an anomaly affecting those eligible to hold a special category visa and permanent residents based on the manner of purchase of residential real estate.

* It will reduce the compliance costs of companies and trusts that are owned by such visa holders who can acquire real estate in their own names without prior foreign investment approval.

* In return, Australia receives some benefits from New Zealand as indicated above.

Increase in the foreign investment threshold for acquisitions of developed non-residential commercial real estate

Background

* Regulation 3(p) of the Act provided an exemption to proposed foreign acquisitions of non residential commercial property (this exemption includes certain lease arrangements) valued at less than $5 million.

* The amended regulation 3(p) of the Act provides for an increase in this threshold from $5 million to $50 million. This results in the acquisition of developed non-residential commercial property (including certain lease arrangements) valued at less than $50 million no longer being subject to the Act. The increased threshold will not apply to properties that are listed in the Register of the National Estate.

Issue

* The agreement to increase the business acquisition notification threshold announced on 4 August 1999 could have created an inconsistency with the $5 million threshold applying to acquisitions of developed non-residential commercial property, where control is not an issue.

- Foreign investment in developed non-residential commercial property is not regarded as sensitive, except where heritage issues arise.

Objective

* To ensure consistent exemption thresholds exist for foreign investment purposes between proposals for foreigners to acquire either developed non-residential commercial property or existing businesses and/or business assets.

* The amendment supports Australian undertakings made in relation to Australia's 1996 and 1998 APEC Individual Action Plans. Australia's Individual Action Plan 1998 states that Australia will:

'rationalise restrictions on foreign investment in real estate, involving some overallliberalisation'.

Benefits

* The change will reduce business and other costs associated with complying with the Act. On the basis of recent applications of around 130 a year it is estimated that the annual saving in business compliance costs and regulatory administrative costs would be in the order of $300,000.

* Allows for a consistent notification threshold for the acquisition of existing businesses, business assets and developed non-residential commercial property.

- This would be particularly important in those cases where uncertainty exists as to whether an asset is a business asset or a developed non-residential commercial property.

Costs

* Cost aspects of the changed regulation for foreign acquisition of developed non-residential commercial property valued at between $5 million and $50 million are discussed in paragraph 19 above.

Amend foreign investment policy applying to Integrated Tourism Resorts designated in the future

Background

* Under the Integrated Tourism Resort (ITR) category established under regulation 3(r) of the

Act, foreign investors have been able to acquire any residential real estate within a designated ITR without the need to seek approval under the Act. *

* The ITR policy was introduced as a special concession to stimulate investment in broad acre destination tourist resorts. At the time it was argued as being critical to the successful development of such tourist infrastructure.

Issue

* Special foreign investment exemptions provided for residential real estate within designated ITRs do not appear to have been successful in supporting the financial viability of ITRs or in attracting higher levels of foreign tourists. The ITR policy has been an anomaly compared to the Government's current policy stance on foreign investment in developed residential real estate that is very restrictive and has been questioned by other residential developers.

Objective

* To remove a residential real estate policy anomaly in the ITR category to ensure that, in order o qualify for special treatment under the ITR category, developed residential real estate must be an integral part of the ITR. That is, subject to a lease back arrangement with the resort operator, whereby the residence is available for tourist accommodation when not occupied by the owner. Existing ITRs will not be affected by this change and residential property within existing ITRs will retain existing foreign investment entitlements.

Benefits

* The new arrangements will encourage the development of a range of tourism accommodation options and increase the pool of tourism accommodation available to the resort operator in any future designated ITRs.

* In order to be considered for designation by the Government as an ITR, a tourist development must satisfy the following criteria:

(i) be a destination tourist development on a contiguous site normally covering a minimum of 50 hectares within well defined boundaries and be planned and constructed by a single developer;

(ii) have an existing core hotel(s) of sufficient size and standard to provide the central focus for the resort and to provide about 20 per cent or more of the ITR's total accommodation;

(iii) have 'non-hotel' accommodation facilities within the boundaries of the resort; and,

(iv) have extensive recreational facilities (such as golf courses, tennis courts, swimming pools, walking tracks etc) within the boundaries of the resort.

* It will also lead to a more consistent application of foreign investment policy in relation to residential real estate within and without ITRs.

Costs

* May slightly increase the compliance costs for operators of ITRs designated in future, but this cost is considered small in comparison to the benefits of the proposal.

Exemption for the acquisition of residential real estate by Australian citizens and their foreign spouses

Background

* Proposals for the acquisition of residential real estate by a foreign person and their Australian citizen spouse are normally approved on condition that the parties acquire the subject property as joint tenants (rather than as tenants-in-common).

- Couples in a de facto husband and wife relationship have been required to demonstrate that their bona fide relationship has been of at least 12 months duration by signing a statutory declaration to that effect.

Issue

* The foreign spouse of an Australian citizen had to obtain foreign investment approval for the purchase of residential real estate. Many Australian citizens were unaware of the requirement and with their foreign spouse frequently sought retrospective foreign investment approval.

Objective

* To provide an exemption from the Act when Australian citizens and their foreign spouses jointly purchase residential real estate.

For consistency, the definition of spouse is equivalent to that in taxation legislation.

Benefits

* Australian citizens with foreign spouses will be relieved of the requirement to obtain foreign investment approval for the purchase of residential property.

- Agents can charge between $200 to $1,000 for submitting such an application for approval.

* The exemption is in accord with Australia's APEC commitments to 'rationalise restrictions on foreign investment in real estate, involving some overall liberalisation'. * The exemption will reduce the administrative and compliance workload.

- Over the last few years, proposals falling into this category have averaged around 10 per cent (around 500 in 1998-98) of the total number of foreign investment proposals examined.

* The annual cost savings for compliance and administration are estimated, on the basis of the number of recent applications to be in the order of $300,000.

Costs

* Consistent with the discussion in paragraph 19 above, any costs associated with this change are expected to be very low, relative to the benefits.

Foreign trustees -acquisition of interests in urban land

Background

* Regulation 3 under the Act provides that the Act, *inter alia,* does not apply in relation to an

acquisition of an interest in urban land by a foreign person that is:

- a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia;

- a life insurance company operating in Australia and the acquisition is made by way of investment of its statutory funds within the meaning of the *Life Insurance Act 1995* primarily for the benefit of policy holders ordinarily resident in Australia; or

- a corporation operating in Australia that maintains a superannuation fund for its employees, within the meaning of the *Superannuation Industry (Supervision) Act (1993)* for the benefit of the members of the fund or their dependents being persons ordinarily resident in Australia, and the acquisition is made as an investment of all or part of the assets of that fund.

* These exemptions were made in recognition that the underlying beneficiaries are predominantly Australian citizens; that investment in land is a necessary part of these entities' commercial activities; that both life insurance companies and superannuation funds operate in the context of specific industry legislation and detailed government regulatory oversight and that ownership of land does not raise significant issues of control.

- However, these specific exemptions for acquisitions of real estate do not extend more broadly to all foreign trustees (or custodians) conducting public trustee businesses on behalf of and for the benefit of Australian beneficiaries.

* With the introduction of the *Managed Investments Act 1998* there will no longer be separate fund managers and trustees. That is, all existing and new managed funds will be

required to have a responsible entity that is solely responsible for the management of the fund and directly responsible to investors for the custody of the fund.

Issue

* Foreign trustees (or custodians) conducting public trustee businesses primarily on behalf of and for the benefit of Australian beneficiaries, have been required to obtain foreign investment approval prior to the acquisition of real estate. This placed such trustees at a disadvantage compared to Australian trustees, life insurance companies and superannuation funds and for this reason worked to the detriment of Australian beneficiaries of such trusts.

Objective

* To encourage neutral treatment of foreign and Australian funds managers, insurance companies and superannuation funds, by exempting from the Act a foreign responsible entity under the *Managed Investments Act 1998,* acquiring an interest in urban land where the units in the trust are held primarily by Australians.

Benefits

* The change places foreign responsible entities (as defined in the *Managed Investments Act* 1998) on a neutral footing for investment in urban land with Australian responsible entities and all life insurance companies and superannuation funds.

- This should reduce foreign investment compliance costs in of foreign owned responsible entities in acquiring urban land thereby enhancing competition and benefiting the beneficiaries of such trusts. It will also eliminate the administrative cost of processing around 50 applications per year from such foreign managed funds. The annual estimated total cost saving is approximately $ 100,000.

Costs

* Consistent with the discussion in paragraph 19 above, the costs of this change are expected to be very low.

Strata titled hotel accommodation

Background

* Under residential real estate policy if a hotel was new, sale of the individual rooms under strata title arrangements fell under the "off-the-plan" residential real estate category so that up to 50 per cent of the rooms could be sold to foreign persons. If the hotel was not new, generally none of the strata titled rooms could be sold to foreign interests, as residential real estate policy generally only allowed eligible foreigners to purchase established (i.e. already developed) residential real estate where they proposed to acquire the property as their principal place of residence.

- This was unlikely to be the case for a strata titled hotel room, more typically purchased as either an investment property or a place of occasional residence, usually for business or holiday purposes.

* Regulation 3 of the Act is extended to exempt the acquisition by foreign interests of stratatitled hotel rooms in designated hotels where each room is subject to a long-term (10

years or more) hotel management agreement and where management retains ownership of the common property.

: For the exemption to apply a formal application process must be followed by the proposed seller of strata-titled hotel rooms to foreign interests.

Issue

* While the acquisition of an entire hotel to a foreign interest was normally permitted under the tourism policy, proposed acquisitions of strata titled hotel rooms/suites etc (rooms) were considered under residential real estate policy.

Objective

* A change of policy is directed to removing the above inconsistency by bringing the treatment of strata titled hotel rooms within the policy applying to the tourism sector. A safeguard is required to ensure the room continues to be used as a hotel room, that is, for short stay accommodation, so that foreign investment policy restraint on developed residential real estate is not undermined.

- Accordingly, to qualify for this treatment, the room must be tied to a long-term management agreement (ten years or more) and the agreement would give the owner rights to an income stream, not occupancy. The management would retain ownership of the common property. In addition, any agreement would need to make clear that owners do not have a right to opt out of the management agreement.

Benefits

* The change represents a liberalisation of policy and is anticipated to deliver a significant benefit to the tourism industry.

* Removes an anomaly in foreign investment policy.

* Promotes the operation of bona fide Australian tourism businesses while providing safeguards to ensure foreign investment in residential real estate is not compromised.

Costs

* It is estimated that on the basis of around 50 applications from hotel operators each year, annual total compliance and administrative costs would be in the order of $100,000. Additional costs may result from the need for a management agreement. These costs are expected to be outweighed by the benefits of the change including increased financing options available to hotel owners which may lead to a reduction in financing costs.

CONSULTATIONS

21. The review was announced by the Treasurer in June 1996, and its status reported on in subsequent Annual Reports of the FIRB. In November 1996, in the APEC context, the Government set limits to the review when it stated that the general preclusion of foreign interests buying developed residential real estate would continue and any approval for foreign interests to acquire vacant land for development would be on the condition that continuous development commences within 12 months of approval. A number of organisations made submissions on possible changes and these submissions were considered by the Treasurer.

22. The review was also undertaken in close consultation with the FIRB. The FIRB is a nonstatutory body established to advise the Government on foreign investment policy and its administration. The main functions of the Board are to:

* examine proposals by foreign interests for acquisitions and new investment projects in Australia and, against the background of the Government's foreign investment policy, to make recommendations to the Government on those proposals;

* advise the Government on foreign investment matters generally;

* foster an awareness and understanding, both in Australia and abroad, of the Government's foreign investment policy;

* provide guidance, where necessary, to foreign investors so that their proposals conform with the policy; and

* monitor and ensure compliance with foreign investment policy.

23. The non-executive members of the Board are in regular contact with Australian business and the general community. The non-executive members have provided considerable feedback on business and community attitudes to the foreign investment policy and on possible changes to the policy.

The Department of Prime Minister and Cabinet through the Joint Prime Ministerial Taskforce on Australia New Zealand Bilateral Economic Relations was consulted on the proposed changes to the regulations arising from the Task Force's work. The Department of Industry, Science and Resources and the Department of the Environment and Heritage were consulted with respect to proposals having a particular impact on their portfolio interests.